



**Department
of Health**

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

August 30, 2017

CERTIFIED MAIL/RETURN RECEIPT

Lena Feygin
Bensonhurst Center for Rehabilitation
1740 84th Street
Brooklyn, New York 11214

██████████
c/o Bensonhurst Center for Rehabilitation
1740 84th Street
Brooklyn, New York 11214

RE: In the Matter of ██████████ – Discharge Appeal

Dear Parties:

Enclosed please find the Decision After Hearing in the above referenced matter. This Decision is final and binding.

The party who did not prevail in this hearing may appeal to the courts pursuant to the provisions of Article 78 of the Civil Practice Law and Rules. If the party wishes to appeal this decision it may seek advice from the legal resources available (e.g. their attorney, the County Bar Association, Legal Aid, etc.). Such an appeal must be commenced within four (4) months from the date of this Decision.

Sincerely,

James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH:
Enclosure

In the Matter of

█/Bensonhurst Center for Rehabilitation

Administrative Law Judge's Decision

Appeal from a Nursing Home Resident Involuntary Discharge pursuant to Title 10 (Health) of the Official Codes, Rules and Regulations of the State of New York (NYCRR) §415.3(h)

Before:

Administrative Law Judge (ALJ) James F. Horan

For Bensonhurst Center for Rehabilitation (Facility):

Nadia Pandiv, R.N., Director of Nursing

For Resident █ (Appellant):

█, Representative

The Facility in Kings County proposes to discharge the Appellant nursing home resident involuntary to the █ (Shelter █). The Facility states that grounds exist for the discharge because the Appellant's condition has improved sufficiently so that he no longer requires care in a nursing home. The Appellant argues that he needs to remain in the Facility and he refuses discharge to the Shelter System and to another location that the Facility proposed. After considering the record, the ALJ finds that the Appellant's condition has improved so that he no longer requires care in a skilled nursing facility and that the Facility has proposed an appropriate discharge to the Shelter System.

I. Background

Under Title 10 NYCRR § 415.3(h), a nursing home resident holds certain rights with regard to transfer or discharge. Title 10 NYCRR § 415.3 (h)(1)(i)(a)(2) allows involuntary discharge if a resident's health has improved sufficiently so that the resident no longer requires

the services that the facility provides. Under the standards at 10 NYCRR § 415.2(k), a nursing home provides nursing and professional services twenty-four hours per day for patients who require those services, but do not require services in a general hospital. In effect, this proceeding acts as a stay on any discharge until the decision on the discharge appeal. If a decision approves the discharge grounds and discharge plan, the proceeding ends with the decision and the discharge may proceed pursuant to the discharge plan.

The Facility provided a Discharge Notice [ALJ Exhibit I, Notice of Hearing] to the Appellant on [REDACTED], 2017. As grounds for the discharge, the Discharge Notice stated that the Appellant no longer requires services in a skilled nursing facility and the Notice identified the Shelter System's intake center at [REDACTED] [REDACTED] [REDACTED], New York as the discharge location. The Appellant then requested the hearing that took place at the Facility in Brooklyn on July 19, 2017. The ALJ conducted the hearing pursuant to New York State Administrative Procedure Act (SAPA) Articles 3-5 (McKinney Supp. 2017) and Title 10 NYCRR Part 415.

At the hearing, the Appellant testified on his own behalf. The Appellant's Representative, [REDACTED] also testified and spoke on the Appellant's behalf. The Facility's Director of Nursing, Nadia Pandiv, R.N., spoke for the Facility and testified concerning the care the Facility provides to the Appellant. The Facility presented two further witnesses: Director of Social Work Lena Feygin and Rehabilitation Director Waheed Bashir. The ALJ received the Notice of Hearing into the record as ALJ Exhibit I. The Appellant offered into the record two documents at the hearing: a [REDACTED] 2017 letter from the [REDACTED] [REDACTED] which entered the record as Appellant Exhibit A, and a [REDACTED] 2017 Notice of Termination of an Admission Agreement from the [REDACTED], which

entered the record as Exhibit B. The Facility offered 15 exhibits into evidence which the ALJ received into the record:

- 1 General Orders █████/17,
- 2 General Orders █████/17,
- 3 Progress Notes █████ 2017,
- 4 Progress Notes █████ 2017,
- 5 Progress Notes █████ 2017,
- 6 Progress Notes █████ 2017,
- 7 Medication Sheet,
- 8 Physician Orders,
- 9 Discharge Summary,
- 10 Evaluation on Discharge,
- 11 Physical Therapy Notes █████ 2017,
- 12 Occupational Therapy Notes █████ 2017,
- 13 Physical Therapy Notes █████ 2017,
- 14 Occupational Therapy Notes █████ 2017,
- 15 Progress Notes █████ 2017.

The record also included a digital audio recording from the hearing on Compact Disc (CD).

References to testimony from the recording will indicate the time in the recording at which the testimony occurs (e.g. "CD at 12:40" means that the testimony occurs on the hearing recording 12 minutes and 40 seconds into that recording).

Under the hearing procedures at §415.3(h)(2)(ii), the Facility bears the burden to prove a discharge necessary and appropriate. Under SAPA § 306(1), a decision in an administrative proceeding must be in accordance with substantial evidence. Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or fact; less than preponderant evidence, but more than mere surmise, conjecture or speculation and constituting a rational basis for decision, Stoker v. Tarantino, 101 A.D.2d 651, 475 N.Y.S.2d 562 (3rd Dept. 1984), appeal dismissed 63 N.Y.2d 649.

II. Findings of Fact

The references in brackets following the findings reflect testimony from the hearing recording or exhibits in evidence [Ex] on which the ALJ relied in making the findings. If contradictory information appears elsewhere in the record, the ALJ considered that information and rejected it.

1. The Appellant entered the Facility on [REDACTED], 2017 from [REDACTED] Hospital for [REDACTED] term rehabilitation [Ex 9].
2. The Appellant's diagnoses include [REDACTED]
[REDACTED] [Ex 8].
3. Prior to the hospital stay at [REDACTED] the Appellant resided at the [REDACTED]
[REDACTED], an assisted living facility [Ex. B].
4. [REDACTED] provided notice to the Appellant in [REDACTED] 2017 that the [REDACTED] was terminating the Admission Agreement with the Appellant because the Appellant required continual medical or nursing care that the [REDACTED] couldn't provide due to the Appellant's behavior and [REDACTED] [Ex B].
5. When the Appellant began rehabilitation at the Facility, he required total assistance, but he can now ambulate with a [REDACTED] walker, transfer independently and perform his own [REDACTED] body dressing and toileting [CD at 13:18, 13:45, 16:44, 30:35].
6. Physical Therapy and Occupational Therapy have discharged the Appellant, although he will continue to need a walker for ambulation [Ex 11-14; CD at 32:21].
7. The Appellant takes multiple medications, but he can take those medications at home or in the community [CD at 3:24].

8. On [REDACTED] 2017 at 6:17 p.m., Donald Martinelli, M.D. documented in Progress Notes that the Appellant was cleared medically for discharge to an adult home or shelter, with no open wounds, alert and oriented, ambulating independently and refusing medication [Ex. 15, page 6/14].
9. On [REDACTED] 2017 at 7:11 p.m., William Florio, M.D. documented in progress notes that the Appellant was dangerous neither to himself nor others, did not require a nursing home and may be discharged to community, assisted living or shelter [Ex 15, page 6/14].
10. At the Appellant's request, Social Services Director Feygin contacted [REDACTED] Nursing Home in [REDACTED] about possibly transferring the Appellant, but [REDACTED] declined because the Appellant had no need for services at the nursing home level [CD at 21:55, 26:44; Ex 9].
11. The Appellant was accepted for placement at the Assisted Living Program at [REDACTED] [REDACTED] in [REDACTED] and at [REDACTED], but the Appellant declined the placements [Ex 9].
12. The Appellant's Representative is working with the nursing home waiver program and would prefer that the Appellant remain in the community until the waiver program can find the Appellant an apartment [Ex A; CD at 36:56].

III. Conclusions

Under 10 NYCRR § 415.3(h)(1)(i)(a)(2) a skilled nursing facility may discharge a resident involuntarily if the resident's health has improved sufficiently so the resident no longer needs the facility's services. The evidence demonstrates that the Appellant has completed

rehabilitation and no longer needs skilled nursing care. The testimony by Nurse Pandiv, Mr. Bashir and Ms. Feygan and the documentation from Drs. Martinelli and Florio demonstrated that the Appellant was independent and able to function in the community and was appropriate for discharge to the Shelter System. The Appellant presented no credible medical evidence to challenge the evidence from the Facility.

The Appellant's Representative asked for the Appellant to remain in the Facility in the hopes that the Appellant could obtain his own apartment through the nursing home waiver program. The Representative stated that it could take 90 days to complete the registration paperwork, but had no time frame for how long it could take to obtain a placement [CD at 56:32]. The Appellant's Exhibit A indicates that the Appellant began the process with the waiver program on May 15, 2017, so the Appellant has remained in the Facility for the 90 days necessary to complete the registration paper work for the waiver program.

The Representative also introduced Exhibit B to show that Oceanview Manor terminated its Admission Agreement with the Appellant in [REDACTED] 2017 because the Appellant required continued medical or nursing care. The Representative offered Exhibit B as proof that the Appellant needed to remain in the Facility. The Facility conceded that the Appellant needed nursing home care in [REDACTED] 2017 and noted that the Facility provided such care beginning in [REDACTED] 2017. The Facility noted, however, that the Appellant's condition has now improved so that he no longer needs such care. Exhibit B noted two chief reasons for the decision on termination. The Exhibit stated first that the Appellant had engaged in repeated behaviors that placed the Appellant and others at imminent risk of harm to himself or others. The [REDACTED] 2017 Progress Note from Dr. Florio stated specifically that the Appellant was not dangerous to himself or others [Ex 15, page 6/14]. Further, Exhibit B stated that the Appellant had [REDACTED] on

himself on two occasions and due to [REDACTED] the Appellant was unsuitable for residing at Oceanview Manor. In his testimony at the hearing, Mr. Bashir stated that the Appellant was capable of toileting himself [CD at 31:17]. The ALJ finds that the Progress Note from Dr. Florio and the testimony by Mr. Bashir demonstrate that the Appellant's has improved since Oceanview Manor wrote the Termination Notice in [REDACTED] 2017.

The Appellant claimed that he needed to remain in a nursing home due to a continued risk of [REDACTED]. The Appellant offered no medical documentation to support that claim. The ALJ also found that the Appellant lacked any credibility as a witness, because the Appellant was non-responsive to some questions from the ALJ and the Respondent refused to answer questions on cross-examination by the Facility.

The Appellant's Representative argued that the Appellant was unsuitable to placement at a shelter or an assisted living facility because the Appellant requires assistance to remember to take his medications. Evidence from the Facility indicated that the Appellant often refuses to take medications, even when he is reminded [Ex 15, page 6/15]. The ALJ notes that the Shelter System will make some assessment concerning whether the Appellant's medication needs would make the Appellant inappropriate for shelter placement. Further, the Appellant's Representative is asking for the Appellant to remain in the Facility until the Appellant can get his own apartment. The Facility asked the Representative to explain how the Appellant would obtain assistance with medications if he lives on his own in an apartment. The Representative failed to provide an explanation.

The Appellant indicated clearly at the hearing that he would refuse to go to the Shelter System. Neither the Facility nor the ALJ can force the Appellant to go to the Shelter System, but the Appellant can no longer remain at the Facility. In moving for involuntary discharge, a Facility

must propose an appropriate discharge plan, rather than a perfect plan or a plan with which the Appellant agrees. The ALJ finds that the Facility has proposed an appropriate plan. Both Drs. Martinelli and Florio have found the Appellant appropriate for discharge to a shelter. The Facility has also tried to obtain alternative placements such as assisted living, which the Appellant has refused. If the Appellant is unwilling to go to the Shelter System, then he will need to find another placement immediately. He should reconsider the offer for placement in assisted living.

ORDER

NOW; after considering the request for Hearing, the testimony and the documents in evidence, the ALJ issues the following Order:

1. The ALJ affirms the Facility's determination that grounds exist under Title 10 NYCRR § 415.3 (h)(1)(i)(a)(2) for the Appellant's involuntary discharge.
2. The ALJ finds the proposed discharge plan appropriate.
3. The discharge may proceed as soon as the Shelter System indicates that it can accept the Appellant.

Dated: Menands, New York
August 30, 2017



James F. Horan
Administrative Law Judge

To:

Lena Faygin, Director of Social Work
Bensonhurst Center for Rehabilitation
1740 84th Street
Brooklyn, NY 11214

Resident ■
c/o Bensonhurst Center for Rehabilitation
1740 84th Street
Brooklyn, NY 11214